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IN THE

Supreme Court of the United States

October Term, 1962

No. 530

RUTH SMITH,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October, 1962.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated and entered September 18, 1962, affirming a judgment of the United States District Court for the Southern District of New York, convicting petitioner of receiving, concealing and facilitating the transportation and concealment of narcotic drugs on two counts of a five-count indictment.

Opinions of the Courts Below

The opinion of the Court of Appeals, printed in the Appendix hereto, *infra*, pp. 23-38, is not yet reported. The opinion of the District Court denying petitioner's motion to suppress certain evidence, made under Rule 41(e) of the Federal Rules of Criminal Procedure, is unreported and is printed in the Appendix hereto, *infra*, pp. 43-45.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was dated and entered September 18, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether probable cause existed to justify an arrest without a warrant where government agents, posing as potential purchasers of narcotics, had a description from the seller of his source of supply in terms that fit petitioner, but there was no evidence that the informant was accurate and reliable or reasonably trustworthy, and the only other facts and circumstances known to the agents prior to the arrest were innocuous and their significance depended upon the word of the informant.

2. Whether there was a voluntary consent to a search and seizure without a warrant at a certain apartment under the following circumstances: The person who the Government claims gave such consent (*viz.*, the petitioner herein) was already under arrest for narcotics found upon her person; she had been interrogated for about an hour by a number of government agents in an automobile parked on the street, without being taken before the nearest available Commissioner; at some time during the interrogation she denied knowledge of additional narcotics; she was not advised of her constitutional rights; her ultimate agreement to take the agents to the apartment in question where additional narcotics were found was in submission to the authority of the agents and in compliance with their de-

mands, and she said that she did not want to get anyone else in trouble; the agents could have applied for a search warrant without prejudice to any right or interest of the Government; and the agents never ascertained the ownership or occupancy of the apartment and the ownership of the suitcase in which the drugs were found.

Constitutional Provisions, Statutes and Federal Rules of Criminal Procedure Involved

The case involves the Fourth Amendment of the Constitution of the United States, 21 U.S.C. §§ 173 and 174, 26 U.S.C. §7607 (2), and Rule 41(e) of the Federal Rules of Criminal Procedure. The text of these provisions is printed in the Appendix hereto, *infra*, pp. 46-49.

Statement of the Case

Petitioner was indicted in five counts for violation of 21 U.S.C. §§ 173 and 174. She made a motion under Rule 41(e) of the Federal Rules of Criminal Procedure to suppress the evidence taken from her person and from an apartment at 108 West 131st Street, and, after a hearing, her motion was denied. She was tried before a District Judge sitting without a jury and was convicted on the two counts which involved the narcotics seized from her person and from said apartment, respectively. She was sentenced to imprisonment for five years on the count which involved the narcotics seized from her person and for seven years on the count which involved the narcotics seized from said apartment, the two sentences to run concurrently. By order of the Court of Appeals, the issuance of the mandate has been stayed and petitioner is at liberty under bail.

All of the testimony was given by narcotics agents either at the hearing on the motion to suppress or at the trial. Petitioner did not testify or call any witnesses. Neither side called Thompson, the source of the agents' information, who was named as a co-defendant and had pleaded guilty.

In the afternoon of October 11, 1961, at an apartment in the City of New York, narcotics agents Robinson and Scott, acting in undercover capacities, were negotiating with one George A. Thompson for the purchase by them of one-quarter kilogram of heroin. Thompson advised the agents that the heroin would cost about $3,200, but that he would have to go out and check the price (21a).[1]

Thompson left the apartment and, followed by two other narcotics agents, Wilcocki and Garofalo, took a taxicab to the Manufacturers Trust Company branch at 125th Street and 8th Avenue, where he remained for about five minutes. He then went by taxicab to a building at 169 East 115th Street, which he entered. Thompson emerged from the building about five minutes later with petitioner. He then took a taxicab back to the apartment where the agents were waiting for him (29a-30a).

Thompson informed agent Robinson that one-quarter kilogram of heroin would cost $3,600. He showed the agents two one-ounce glassine bags containing a white powder, which he stated he had obtained from his source of supply. When asked by Robinson who this source of supply was, Thompson replied that it was a woman who worked at a store. Thompson and agent Robinson then arranged to meet

[1] The references herein are to pages of "Appellant's Appendix" (printed) in the Court below, nine copies of which are filed herewith.

again at 2:00 P.M. on the following day at 145th Street and St. Nicholas Avenue, New York City, for Robinson to purchase the heroin. Thompson invited the agents to lunch at a restaurant on 42nd Street. In the restroom thereof, Thompson gave one of the bags, later determined to contain heroin, to agent Scott (22a-24a).

The next day, October 12, agent Robinson met Thompson at the designated corner. Thompson asked for the money in advance, but the agent refused. Instead, Robinson opened the trunk of his car and showed Thompson what was supposed to be $3,600. Thompson then said that he would go to the source of supply to find out if the sale could be made, cash on delivery (24a).

Thompson then took a taxicab and, under the surveillance of agents Wilcocki and Garofalo, proceeded to 169 East 115th Street (31a-32a). After ten minutes, Thompson emerged from the building and returned to 145th Street and St. Nicholas Avenue, where he rejoined Robinson, and informed the agent that his source of supply would deliver the heroin, cash on delivery. Robinson testified that since he would have to meet the source, he asked Thompson who she was, and he was told by Thompson that she was a girl by the name of Ruth, who had blue hair and worked at Goody's drug store (25a).

Robinson and Thompson then went to a telephone booth and Thompson placed a call. He said, "May I speak to Ruth?" then, "Okay, I will call back in 15 minutes." On the pretext of calling his girl friend, Robinson then telephoned his office and told the agents there that Thompson's source of supply was named Ruth, that she worked at Goody's drug store and had blue hair (25a).

At about 4:00 P.M., Thompson called again and was heard by Robinson to say, "Okay, in 30 minutes at 131st Street and Seventh Avenue." Robinson then gave a prearranged signal to agents Wilcocki and Garofalo who placed Thompson under arrest, searched him and found in his pocket a glassine envelope containing an ounce of heroin (26a).

Under subsequent interrogation, Thompson said that he was to receive delivery of one-quarter kilogram of heroin at the corner of West 131st Street and Seventh Avenue from Ruth Smith (the petitioner) (33a).

Other agents observed petitioner emerge from Goody's drug store and enter a building at 108 West 131st Street, where she remained for about ten or fifteen minutes. She then walked west across Seventh Avenue on 131st Street, where she was placed under arrest. Her purse was searched and in it was found a small package containing 131 grams of heroin (40a-41a, 71a). The agents did not possess a warrant of arrest (19a).

After petitioner's arrest at 4:30 P.M., the arresting agents, Krueger and Cantu, seated petitioner in the back seat of agent Garofalo's car (52a). At this point there is a divergence in the testimony of agent Cantu and that of another participating agent, Manley. Agent Cantu testified that petitioner was taken to 142nd Street in agent Garofalo's car by agents Garofalo, Tripodi and Cantu (53a). En route, petitioner was asked where she got the package and who was in the apartment that they had been watching (presumably at 108 West 131st Street), to which she replied that she did not know (56a-57a).

After the car was parked, Manley came to the car and questioned her for over one-half hour or an hour and other

agents variously interrogated her (57a). In response to Garofalo's interrogation as to where she got the "stuff", who owned the apartment and whether there was more "stuff" in the apartment, petitioner kept saying, "No, no, I don't know anything about anything" (58a-59a).

Agent Manley testified, however, that immediately after petitioner was arrested, he drove to 131st Street between Seventh and Eighth Avenues, where he found petitioner seated with two agents in the back of one of the Government's cars. He had her transferred to his car and, with agent Rahas, drove her to 143rd Street and Seventh Avenue, where he parked (41a). He testified that there was no conversation with appellant on the trip and he commenced to question her after the car was parked (44a). The following is his testimony with respect to his interrogation of petitioner:

> "Q. What did Ruth Smith say to you and what did you say to her? A. I asked her where the rest of the stuff was and she said she didn't have any more. I told her, 'Come on, Ruth, you know better than that.'
>
> With this she started crying and she said, 'Yes, I have some more but I don't want to get anyone else in trouble.'
>
> I said, 'Ruth, if that is your own, you won't be getting anybody else in trouble.'
>
> She said, 'All right, I will take you to it but I will only take two of you. I don't want anyone else to go with me because I don't want to cause any trouble' " (41a-42a).

This conversation took place at about 4:35 P.M. (45a), which would be about five minutes after the arrest.

Without a search warrant, agents Manley and Rahas then went with petitioner to 108 West 131st Street. They climbed two or three flights of stairs and reached a top floor apartment. Petitioner knocked and a man about 75 or 80 years old answered the door. They walked inside and she said to him, "Danny, there is no trouble. I jus' want my suitcase." Petitioner reached behind a bed, pulled out a suitcase and placed it on the bed. She told Manley, "The stuff is in the suitcase," and gave him a key, with which he opened the suitcase and found a brown paper bag which contained eleven packages of heroin. Manley showed the contents of the bag to Rahas and the agents, with petitioner in custody, left the apartment (42a, 46a-48a).

Agent Manley did not ask petitioner, and never ascertained, whose apartment this was or to whom the suitcase belonged (48a-49a). The agents then drove with petitioner to her residence at 115th Street near Second Avenue. Agents Rahas and Garofalo went with petitioner up to her apartment where they secured a paper bag containing about $800. Agent Rahas checked the money against an advance list of the money that the agents had expended for narcotics, and when he found that it did not check, he gave $300. to a blind woman in the apartment and the balance to agent Garofalo, who gave petitioner a receipt therefor. The agents then proceeded with petitioner to the office of the Federal Bureau of Narcotics in Manhattan (94a-96a).

Agent Manley testified at the trial that at the time of the earlier hearing on the motion to suppress he had forgotten about the visit to petitioner's apartment (87a-88a).

The reasoning of the Court of Appeals, in affirming the District Court's determinations on the issues as to the arrest and search and seizure, is set forth in "Reasons for the Allowance of the Writ", *infra*.

Reasons for the Allowance of the Writ

The case presents two distinct issues meriting certiorari. These are hereinafter discussed in their sequence in the case, and not necessarily in the order of importance. The first deals with the existence of probable cause to justify the arrest without a warrant. The second deals with "consent" so as to obviate the necessity of a search warrant to sustain the search and seizure at the 131st Street apartment.

I

With respect to probable cause for the arrest without a warrant:

This Court has never made a decision with respect to probable cause in a factual pattern similar to that herein presented. Indeed, we have been unable to find a ruling by any lower court which deals with the question of probable cause for arrest without a warrant, when the information is gathered by government agents in a setting resembling that here presented, and where the arrest preceded the discovery of the drugs or other illicit matter.

Here, Thompson, a narcotics peddler, gave a description of his source of supply to narcotics agents, who were acting in undercover capacities as potential purchasers, in terms which fit the petitioner. There was no showing of any previous dealings between the agents and Thompson, from which his reliability and trustworthiness could be established or inferred.

In *Draper v. United States*, 358 U. S., 307, this Court held that probable cause existed where the agents obtained

information from a "special employee" whose information had previously been found accurate and reliable, combined with the facts that the informant's description of the defendant's appearance and of where the defendant would be on a given morning agreed with the officers' observations.

This and other rulings suggest that information received from an informant will not suffice to show probable cause, unless the informant had previously proved to be reliable or unless such information has substantial verification or supplementation in facts personally known to the officers. *E.g.*, *Wong Sun* v. *United States*, 288 F. 2d 366, 370 (9th Cir.), *cert. granted*, 368 U. S. 817; *Rodgers* v. *United States*, 267 F. 2d 79, 85 (9th Cir.); *Cervantes* v. *United States*, 263 F. 2d 800, 804 (9th Cir.); *Wrightson* v. *United States*, 222 F. 2d 556, 558 (D.C. Cir.); *Contee* v. *United States*, 215 F. 2d 324, 327 (D.C. Cir.).

Narcotics agents and police usually get their information from a government informer or a "special employee" of the Government. Such an individual has a basic reason for giving reliable information, in that his remuneration or reward depends upon his veracity and accuracy. Here, however, Thompson was himself a narcotics seller, dealing, so far as this record establishes, for the first time with the government agents who were to become his customers. The motivations which prompted Thompson to describe petitioner as his source of supply could run the gamut from deception or spite to calculated self-protection. A correct description of his source of supply could result in his own loss of income, for he would then no longer be needed in future dealings.

The Court of Appeals interpreted the testimony as calling for a meeting between the agents and the source of supply (*infra*, pp. 26, 34). However, after his arrest Thompson stated to the agents while under interrogation that the delivery of the narcotics was to be made by Ruth Smith (petitioner) to him (33a).

In any event, the Court of Appeals recognized that the discription of petitioner as the source of supply by an informant of unknown reliability was "perhaps not enough to give the Government reasonable grounds for arresting Mrs. Smith" (*infra*, p. 33). The Court of Appeals regarded as extensive reliable evidence, additional to the word of the narcotics peddler, that when Thompson went to check the price of the heroin a day before the sale was to be made, he was seen with petitioner; that on the day of the sale he had to check a detail of the sale and he went to the apartment house wherein petitioner resided; that he gave to his potential customers a package containing heroin, which he stated he had obtained from his source of supply; and that he made arrangements for the delivery of the narcotics and petitioner appeared at the appointed time, walking in the vicinity where the delivery was to take place.

From these items, the Court of Appeals held that at the time of petitioner's arrest, Thompson's reliability had been sufficiently corroborated so that the agents had the requisite probable cause to arrest petitioner without a warrant, and that consequently the search incidental thereto was lawful (*infra*, pp. 34-35).

Such additional evidence relied upon by the Court below consists of acts which in themselves are completely innocuous. Their significance is bottomed upon the veracity of

the informant. No incriminating act on the part of petitioner was observed prior to her arrest. But for Thompson's statement, there is nothing suggestive of her guilt.

Probable cause exists when there is knowledge of facts or of reasonably trustworthy information sufficient to justify the officer in the belief that an offense has been or is being committed (*Brinegar* v. *United States*, 338 U. S. 160, 175; *Director General* v. *Kastenbaum*, 263 U. S. 25, 28).

The personal knowledge of the agents needed to corroborate a disclosure by an informant of unproven reliability should be of some material fact or facts tending to show that a defendant is implicated in the alleged crime. Any less exacting rule would place an individual at the mercy of a narcotics peddler of unknown veracity.

To rule, as the Court of Appeals did, that there was reliable evidence, additional to the word of Thompson, is to judge by hindsight. The reliability of the additional evidence depended upon the reliability of Thompson, of which the agents had no knowledge. It is submitted that probable cause existed in the instant case only after petitioner was searched and the package was found. But as this Court has often said, "a search is not to be made legal by what it turns up" (*United States* v. *Di Re*, 332 U. S. 581, 595).

To sustain a finding of probable cause, the facts must be sufficiently strong to justify the issuance of a warrant (*Wrightson* v. *United States*, 222 F. 2d 556, 559 (D.C. Cir.); *Worthington* v. *United States*, 166 F. 2d 557, 562 (6th Cir.).

The combination of the agents' information and their observations probably would not have justified the issuance of a warrant of arrest, for the agents could present no facts which lay in their own knowledge sufficient to warrant a reasonable belief that petitioner was violating the law relating to narcotics. (*Cf. Giordenello* v. *United States*, 357 U. S. 480, 485-486.)

The agents did not seek a warrant of arrest even though they had a description of the source of supply a day prior to the proposed sale. They did not hold off the arrest until the actual delivery of the narcotics (petitioner and Thompson were under surveillance and the agents were all over the area in force and with automobiles), when they would not need a warrant, for the crime would then be committed in their presence. What the agents did was to gamble upon their faith in Thompson's veracity, and hope to turn up contraband which would justify their efforts. Constitutional rights should not be left to the whim of over-zealous officers who are loath to invoke the judicial processes (not only as to the arrest herein but also with respect to the search and seizure hereinafter discussed).

This Court should grant certiorari herein in order to lay down a guide-line setting out the quality of the evidence necessary to corroborate a disclosure from an informant of unknown reliability, before an arrest without a warrant may legally be made.

II

With respect to consent to the search and seizure at the 131st Street apartment:

After petitioner was placed under arrest and searched, she was seated in the back seat of a government car and driven for about 12 blocks until the car was stopped and several agents interrogated her. According to agent Cantu, she was questioned during the trip as to where she had obtained the package and who was in the apartment that they had been watching. Petitioner replied that she did not know. After the car was parked, in response to continued interrogation as to where she had secured the narcotics, who owned the apartment and whether there were more narcotics in the apartment, she kept saying, "No, no, I don't know anything about anything" (56a-59a).

On the other hand, agent Manley said that he drove her for the 12 blocks (which is at variance with what agent Cantu testified to) and that there was no conversation during the journey (44a). A few minutes after the car was parked, agent Manley asked petitioner where the rest of the "stuff" was and petitioner said that she did not have any more. However, when agent Manley said, "Come on, Ruth, you know better than that," she started crying and admitted that she had more, but that she did not want to get anyone else in trouble. When the agent said, "If that is your own, you won't be getting anybody else in trouble," she said, "I will take you to it, but I will only take two of you." She said that she did not want anyone else to go with her because she did not want to cause any trouble (41a-42a). While agent Manley placed the time of this conversation at 4:35 P.M. (45a), five minutes after petitioner's arrest, agent

Cantu said that Manley's interrogation took a very long time, "surely over half an hour or an hour" (57a).

Thereupon, she went with two agents (Manley and his partner) to the apartment at West 131st Street, knocked on the door, and when an old man answered, she said, "Danny, there is no trouble. I just want my suitcase." She then told Manley, "The stuff is in the suitcase," and gave him a key to open it. He looked at the package and left with his brother agent and petitioner (42a, 46a-48a).

The Court of Appeals recognized that the search in the apartment was not incidental to the arrest on the street and since the agents had no search warrant, the validity of the seizure of the narcotics and their use against petitioner depended upon whether there was a consent. The Court of Appeals held that inasmuch as petitioner did not take the stand or call any witnesses, there was no basis for doubting the credibility of the narcotics agents, whose testimony, the Court said, clearly supported a consent. To quote the Court of Appeals, "She was under no compulsion when she led the officers to the place of hiding, and she actively assisted them from that time forward" (*infra*, p. 38).

It is respectfully submitted that the decision of the Court of Appeals herein is at variance with decisions in other circuits which hold that "the circumstances of the defendant's plight may be such as to make any claim of actual consent 'not in accordance with human experience', and explainable only on the basis of 'physical or moral compulsion.' *Ray* v. *United States*, 5 Cir., 84 F. 2d 654, 656." *Judd* v. *United States*, 190 F. 2d 649, 651 (D.C. Cir.).

Credibility of the agents, which was stressed by the Courts below and which is emphasized in other decisions in

the Second Circuit, is not the central issue. The real question is whether, under the standards laid down by this Court and other federal courts, the testimony of the agents herein, taken at full value, warrants a finding that petitioner freely and intelligently gave her unequivocal and specific consent to the search (*Channel* v. *United States*, 285 F. 2d 217, 220 (9th Cir.). The burden is upon the Government to prove by clear and positive evidence that such a consent was given (*Rigby* v. *United States*, 247 F. 2d 584, 585 (D.C. Cir.); *Judd* v. *United States*, 190 F. 2d 649, 651 (D.C. Cir.)).

If the Court below erroneously decided the "consent" issue here presented, and if it is not corrected by this Court, the invitation to law enforcement officers to rely upon claims of waiver in order to avoid the inconvenience of securing a search warrant presents a truly fearsome threat to the entire fabric of the fundamental rights guaranteed by the Fourth Amendment.

Petitioner was under arrest, her purse had been searched and the bag of narcotics was seized. At least six or seven agents participated in the display of authority. Then, without being taken before the nearest available commissioner, as required by Rule 5(a) of the Federal Rules of Criminal Procedure, she was driven about 12 blocks and, seated in a parked car, subjected to interrogation for about an hour, during part of which she denied knowledge of additional narcotics in the presence of agent Cantu.

In *Judd* v. *United States*, 190 F. 2d 649, 651 (D.C. Cir.), the Court said:

> "This burden on the Government is particularly heavy in cases where the individual is under arrest. Non-resistance to the orders or suggestions of the

police is not infrequent in such a situation; true consent, free of fear or pressure, is not so readily to be found."

The Court below cited the decision of this Court in *United States* v. *Mitchell*, 322 U. S. 65, for the proposition that "if the defendant admits his guilt to the officer, instead of denying it to him, and then allows a search without a warrant, this strongly implies voluntary consent on his part" (*infra*, p. 37). But in the *Mitchell* case, this Court found (at p. 69) that there were a prompt and spontaneous confession and consent to the search of the defendant's home, which preceded the illegal detention.

In *Ray* v. *United States*, 84 F. 2d 654 (5th Cir.), the defendant was arrested without any warrant for having liquor in his automobile. An officer testified that after defendant's arrest, he voluntarily told the officers that he had liquor in his house, took them there and showed it to them. Yet, the Court held that "the evidence admits of only one conclusion, that there was only a nominal, not a true volition. That whatever disclosures appellant made were compelled by the situation and circumstances in which he found himself," after having been placed under arrest (p. 655). The Court went on to say (at p. 656):

> "We think it not in accordance with human experience that a defendant, arrested for transporting liquor, would, unless he were under physical or moral compulsion, act as the defendant did here and make the disclosures that he did."

To the same effect:

United States v. *Arrington*, 215 F. 2d 630 (7th Cir.);

United States v. *Baldocci*, 42 F. 2d 567 (S.D. Calif.);

United States v. *McCann*, 40 F. 2d 295 (S.D. N.Y.);
United States v. *Novero*, 58 F. Supp. 275 (E.D. Mo.);
United States v. *Fowler*, 17 F.R.D. 499 (S.D. Calif.).

The Second Circuit apparently holds that coercion or compulsion must be shown as a factual issue in a narrowly "objective" or direct sense. Other circuits, as shown by the decisions above cited, have regarded the circumstances of the arrest and detention as inferentially indicative of moral and implied coercion, particularly when the defendant was not advised of his constitutional rights which he is supposed to be waiving.

The apparent disagreement between the circuits is pointed out in *United States* v. *DeVivo*, 190 F. Supp. 483 (E.D.N.Y.) where the Court said (at p. 486):

> "Some cases hold that the circumstances of the defendant's plight is often such that the mere verbalization of a consent to a search by officers of the law after they have identified themselves is not a voluntary consent because it is not in accordance with human experience and can only be explained by physical or moral coercion [citing cases], in all of which it was held that voluntary consent had not been given. From these cases it appears that the Courts have relied upon what they believed was the operation of the defendant's mind, based upon 'human experience,' which, as far as the Court is concerned, of necessity must be hypothetical rather than real. Although this may be explained by the desire to zealously protect the defendant's constitutional rights, in this circuit it appears that a more

> objective approach has been followed and that the 'question of whether consent to a search is voluntary is one of fact.' " (Citing case.)

It is respectfully submitted that under the basic law respecting waiver of constitutional rights in this area, the Second Circuit doctrine is incorrect, and that the instant case is well illustrative thereof for several cogent reasons.

In the first place, since a waiver is an intentional relinquishment or abandonment of a known right (*Johnson* v. *Zerbst*, 304 U. S. 458, 464), it should be shown that the defendant under arrest knew of his rights under the Fourth and Fifth Amendments. The record herein clearly demonstrates that petitioner was not advised of her rights and that the agents were not concerned with educating her. The language in *Canida* v. *United States*, 250 F. 2d 822, 825 (5th Cir.) is apt:

> "To hold, as was done in this case, that agents can, by the application of sufficient pressure upon persons either too timid or too unadvised of their rights to assert them, do away with the necessity of obtaining a search warrant for their homes is to completely nullify the Fourth Amendment."

See, also, *People* v. *Ziegler*, 358 Mich., 355, 364, 100 N.W. 2d 456, 461.

Furthermore, when in response to agent Manley's interrogation appellant agreed to take the officers to the apartment where the additional narcotics were secreted, she was merely submitting to and complying with her captors' demands. Submission to authority is not a consent and does not result in a waiver of a constitutional right. *Johnson* v. *United States*, 333 U. S. 10, 13; *Waldron* v. *United States* 219 F. 2d 37 (D.C. Cir.); *Hobson* v. *United States*, 226 F.

2d 890, 894 (8th Cir.); *United States* v. *Hoffenberg*, 24 F. Supp. 989 (E.D.N.Y.).

The Court below said:

> "Furthermore, the degree of affirmative assistance given to the police by the suspect is often relevant in determining whether consent exists. See *United States* v. *Burgos*, 269 F. 2d 763 (2 Cir. 1959), *cert. denied*, 362 U. S. 942 (1960); *United States* v. *MacLeod*, 207 F. 2d 853 (7 Cir. 1953)" (*infra*, p. 37).

The *Burgos* case, being a Second Circuit decision, merely confirmed the pattern in this Circuit. The *MacLeod* case involved a defendant who was not under arrest. Furthermore, in *United States* v. *Arrington*, 215 F. 2d 630, 637 (7th Cir.), the Court said that it went further in *MacLeod* in sustaining a finding of consent than had been done by any other court. In *Higgins* v. *United States*, 209 F. 2d 819, 820 (D.C. Cir.), the Court expressly disagreed with the *MacLeod* decision.

Finally, to sustain a consent, it must be found that petitioner was not acting under fear or display of force or pressure by the agents. In the light of her denials of knowledge of additional narcotics, and her expressed desire to protect other people, coupled with the circumstances of her detention, it is apparent that she was motivated by factors other than a conscious waiver of her constitutional rights. An unequivocal and specific consent, uncontaminated by any duress or coercion or compulsion, actual or implied, is here contrary to human behavior and experience.

It is respectfully submitted that the issue herein presented affords a proper occasion for this Court not only to

clarify the conditions under which a waiver may be found but also to declare itself against the increasing practice of federal officers in entering and searching a home without a warrant on the tenuous theory of an alleged consent, particularly when no reason is shown why a search warrant was not obtained. Instead of seeking to claim that the petitioner herein knowingly waived her fundamental constitutional rights, the agents, with little time and effort, could have secured a search warrant. Petitioner was under arrest and in the custody of the officers. The agents, with or without the revelation made by petitioner, knew where the additional narcotics were said to be secreted. There was no valid justification for the failure to obtain a search warrant and to comply with the Fourth Amendment (See *Johnson v. United States*, 333 U. S. 10, 15).

The need for maintaining the requirement of a search warrant is particularly apparent in the instant case, for the entrance was made to an apartment which, for aught that appears, did not belong to petitioner. An old man in the apartment answered the door to petitioner's knock. The officers, in their zeal to seize the sought-for contraband, never even bothered to ascertain the ownership of the apartment or of the suitcase wherein the drugs were found. Since there was no likelihood that the agents were going to lose their find, there was no justifiable reason why the judicial processes were not invoked to give the entrance to the apartment the requisite legality. The constitutional safeguards against improper intrusions upon the private lives of individuals should be vindicated in this case rather than approval given to the "laissez-faire" approach of the Court below whereby the conduct of these officers in unnecessarily taking the law into their own hands was con-

doned (See *United States v. Jeffers*, 342 U. S. 48, 51.) If taking the time to secure a warrant under the facts herein presented is to be regarded as an idle gesture, then the Fourth Amendment loses its value and meaning. This Court, by granting the writ in this case, should speak out against a practice which is becoming a tacit substitute for the Fourth Amendment.

CONCLUSION

For the foregoing reasons a writ of certiorari should be granted.

Respectfully submitted,

JULIUS A. ITZKOWITZ,
Attorney for Petitioner,
150 Broadway,
New York 38, New York.

October, 1962.

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 368—September Term, 1961.

(Argued June 7, 1962 Decided September 18, 1962.)

Docket No. 27476

UNITED STATES OF AMERICA,

Appellee,

—v.—

RUTH SMITH,

Appellant.

Before:

CLARK, WATERMAN and MOORE,

Circuit Judges.

Appeal from judgment of conviction, United States District Court for the Southern District of New York, Bonsal, *J.*

Appellant, convicted of having violated 21 U. S. C. §§173, 174, seeks reversal on the ground that evidence admitted against her at her trial was unconstitutionally seized. Judgment of conviction affirmed.

ROBERT M. MORGENTHAU, United States Attorney, Southern District of New York (Robert M. Cipes, Arnold N. Enker, Asst. U. S. Attorneys, of counsel), *for Appellee.*

JULIUS ITZKOWITZ (Myron G. Lasser, on the brief), New York City, for *Appellant.*

WATERMAN, *Circuit Judge:*

After a trial before a judge sitting without a jury in the United States District Court for the Southern District of New York, appellant was convicted on March 15, 1962, on two counts of a five count indictment. The two counts under which she was convicted, counts three and four, charged her with receiving, concealing, and facilitating the transportation and concealment of narcotics in violation of 21 U. S. C. §§173, 174 (1958). The district court sentenced appellant to five years imprisonment upon count three, and seven years imprisonment upon count four, the two sentences to run concurrently. Appellant now appeals from her conviction.

Appellant made a motion, subsequently denied, for an order suppressing certain evidence, some taken from her person and some obtained by the officers from an apartment. The testimony and exhibits presented by the Government at the hearing on this motion and at appellant's subsequent trial developed the following facts relating to appellant's arrest and the events that followed. Appellant presented no evidence at either the hearing or the trial.

On October 11, 1961, shortly after 1:30 P.M. at an apartment in Hamilton Terrace in Manhattan, narcotics agents Robinson and Scott, acting in undercover capacities, were negotiating with one George A. Thompson for the purchase of one-quarter kilogram of heroin. Thompson told the agents that one-quarter kilogram would cost them about $3,200, but that he would have to go out and check on the price.

At approximately 2:05 P.M. Thompson left the apartment in order to check the price he had quoted to the agents. After leaving the apartment, Thompson was followed by two other narcotics agents, Wilcocki and Garafalo. Thompson entered a taxi and rode to the Manufacturers Trust branch bank at 125th Street and Eighth Avenue. He remained in the bank for about five minutes, then entered another taxi and went to a building at 169 East 115th Street, which he entered.

He emerged from the building five minutes later with appellant Ruth Smith. Then he caught a taxi back to Hamilton Terrace, arriving there at approximately 3:00 P. M.

Upon his return to the apartment at Hamilton Terrace where agents Robinson and Scott were waiting, Thompson informed them that one-quarter kilogram of heroin would cost $3,600. He showed the agents two one-ounce glassine bags containing a white powder that he claimed he had obtained from his source of supply. Agent Robinson asked Thompson who this source of supply was and was told that it was a woman who worked at a store. Thompson and agent Robinson then arranged to meet again at 2:00 P. M.

the next day at 145th Street and St. Nicholas Avenue so that Robinson could purchase a quarter kilogram of heroin.

After their conversation in the apartment Thompson invited the two agents to lunch at a restaurant on 42nd Street. While at the restaurant the three men entered the men's restroom, where Thompson pulled out of his pocket two glassine bags of white powder and gave one of the bags to agent Scott. This bag contained heroin.

The next day, October 12, agent Robinson met Thompson at 2:30 P. M. at the corner of 145th Street and St. Nicholas Avenue. Thompson asked for the purchase price of $3,600, but agent Robinson refused to hand over the money. Instead, the officer opened the trunk of his car and showed Thompson what was supposed to be the $3,600. Thompson then told Robinson that he would go to his source of supply and find out if she would deliver the heroin, cash on delivery.

Thompson then caught a taxi and, under the surveillance of narcotics agents Wilcocki and Garofalo, drove to 169 East 115th Street. After ten minutes Thompson emerged from the building and returned to 145th Street and St. Nicholas Avenue, where he rejoined Robinson and informed the agent that the source of supply would deliver the heroin, cash on delivery. Since the federal officer was to meet the source and receive the heroin from her, he asked Thompson who she was. Thompson told him that she was a girl named Ruth who had "blue hair" and worked at Goody's drug store.

Next, Thompson and Robinson walked over to a telephone booth and Thompson placed a call. He said, "May

I speak to Ruth?" (pause) "Okay, I will call back in 15 minutes."

Then, on the pretext of calling his girl friend, Robinson telephoned his office and told the agents there that Thompson's source of supply was a girl by the name of Ruth who worked at Goody's drug store and had blue hair.

At 4:00 P. M. Thompson again telephoned the number he had called earlier and was heard by Robinson to say, "Okay, in 30 minutes at 131st and Seventh Avenue."

At this point Robinson gave a prearranged signal; then the covering agents Wilcocki and Garofalo placed Thompson under arrest, searched him, and found in his pocket a glassine envelope containing heroin. Upon subsequent interrogation of Thompson these two agents learned that a girl named Ruth Smith was to deliiver a quarter of a kilogram of heroin at 4:30 P. M. at the corner of 131st Street and Seventh Avenue. Agents Wilcocki and Garofalo also "arrested" agent Robinson and placed him in a separate car from the one in which they put Thompson.

The three agents, with Thompson, then drove to 131st Street and Seventh Avenue. By this time several other narcotics agents had converged on this location. They observed appellant, who had come from Goody's drug store, enter a building at 108 West 131st Street, emerge after ten or fifteen minutes, and start to walk west across Seventh Avenue on 131st Street. As she crossed Seventh Avenue, two additional narcotics agents, Krueger and Cantu, arrested her, searched her purse, and found a small package containing 131 grams of heroin. Krueger and Cantu did not possess a warrant of arrest.

The facts recited above relate to appellant's first contention upon this appeal: namely, that appellant was illegally arrested and searched. The following factual account relates to her second contention, that after her arrest officers committed an illegal search of premises at 108 West 131st Street.

Having arrested appellant, Krueger and Cantu seated her in the back seat of Garofalo's car. At this point there is a divergence in the testimony of agent Cantu and that of another participating agent, Manley. Cantu testified that appellant was driven up Seventh Avenue about to 142nd Street in agent Garofalo's car; and that en route, a trip of five to ten minutes, agents Garofalo and Tripodi asked her where she got the package, and who was in the apartment house they had been watching (presumably at 108 West 131st Street), to which she replied that she did not know. He also testified that they parked at 142nd Street, that appellant remained in the car, and that there agent Manley assumed the bulk of the interrogation, questioning appellant for more than half an hour.

Agent Manley testified, however, that at 131st Street, immediately after the arrest, he put appellant in his own car, that with agent Rahas he drove her to 142nd Street and Seventh Avenue, that en route there was no conversation with appellant, and that once the car was parked he began to interrogate her. From either account we conclude that appellant was driven ten blocks up Seventh Avenue and that agent Manley commenced his interrogation as soon as the trip was ended.

During his questioning Manley asked appellant where the rest of the narcotics were. She said she did not have any more. Agent Manley said, "Come on, Ruth, you know better than that."

Mrs. Smith then began to cry and said, "Yes, I have some more but I don't want to get anyone else in trouble." She informed the narcotics agent that she had thrown out her husband because he had been dealing in narcotics and now she herself felt ashamed to be in the position she was in.

The agent replied, "Ruth, if that is your own, you won't be getting anybody else in trouble."

Appellant answered, "All right. I will take you to it but I will only take two of you. I don't want anyone else to go with me because I don't want to cause any trouble."

Appellant led the narcotics agents back to 108 West 131st Street, the building she had been observed to enter just prior to her arrest. Mrs. Smith took agents Manley and Rahas to a top floor apartment. There she knocked. An old man answered the door. Mrs. Smith said to him, "Danny, there is no trouble. I just want my suitcase." The old man stepped aside, and, followed by the two federal officers, appellant entered the apartment. She walked over to a bed, reached behind it, pulled out a suitcase, and placed it on the bed.

To Manley she said, "The stuff is in the suitcase."

He replied, "Okay, Ruth, I will get it out." Then appellant handed him a key, with which he opened the suitcase. In the suitcase Manley found a brown paper bag which

contained eleven packages of heroin, weighing over two and a third kilograms.

After Manley had shown the contents of the bag to Rahas, the agents, with appellant in custody, left the apartment, taking with them the heroin which they had discovered there. The agents made no further search of the premises.

From 131st Street the narcotics agents drove to appellant's residence on 115th Street near Second Avenue. Agents Rahas and Garofalo went with appellant to her apartment and there recovered $500.00 which the Government had used to purchase narcotics on previous occasions, appellant taking the money out of a suitcase and handing it to the federal officers. They were in this apartment for no more than five minutes. While the others were in the apartment on 115th Street, agent Manley remained downstairs in the car with the narcotics taken from the 131st Street apartment. Then the officers drove appellant to the offices of the Bureau of Narcotics at 90 Church Street in Manhattan, arriving there sometime between 5:30 and 6:30.[1]

As we stated earlier, the first question upon this appeal is whether appellant's arrest on the corner of 131st Street and Seventh Avenue was a legal arrest. If illegal, the search of her purse incident to that arrest was an illegal

[1] At the hearing on the motion to suppress, agent Manley testified that after leaving the first apartment, 108 West 131st Street, the officers took Mrs. Smith directly to their office at 90 Church Street. At the subsequent trial, however, he testified that at the time of the earlier hearing he had forgotten about the visit to the 115th Street apartment.

search, and the narcotics so discovered would be inadmissible as evidence of appellant's guilt. See *Weeks* v. *United States*, 232 U. S. 383 (1914); *Agnello* v. *United States*, 269 U. S. 20, 30 (1925); *United States* v. *Walker*, 246 F. 2d 519 (7 Cir. 1957); *Wrightson* v. *United States*, 222 F. 2d 556, 559 (D. C. Cir. 1955).

The relevant statute is Narcotics Control Act 104(a) (2), 70 Stat. 570 (1956), 26 U. S. C. §7607(2) (1958). It states in pertinent part:

> §7607. *Additional authority for Bureau of Narcotics and Bureau of Customs.*
>
> [A]gents of the Bureau of Narcotics of the Department of the Treasury • • • may—
>
> (2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

Therefore, the question becomes one of whether the agents had "reasonable grounds," or, as it is more often labeled, "probable cause," for believing that appellant had committed or was committing a violation of the narcotics laws. The scope of section 104(a) (2) of the Narcotics Control Act is substantially equivalent to the extent of the permission granted to law enforcement officers by the Fourth Amendment. See *Draper* v. *United States*, 358 U. S. 307, 310 (1959); *Rodgers* v. *United States*, 267 F. 2d 79, 84 (9 Cir. 1959).

The principles involved in the concept of probable cause, which justifies an arrest without a warrant, are set forth in the oft-quoted opinion of the Supreme Court in *Brinegar v. United States*, 338 U. S. 160, 175-76 (1949):

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
>
> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." McCarthy v. De Armit, 99 Pa. 63, 69, quoted with approval in the Carroll opinion. 267 U. S. at page 161, 45 S. Ct. at page 288, 69 L. Ed. 543, 39 A. L. R. 790. And this "means less than evidence which would justify condemnation" or conviction; as Marshall, C.J., said for the Court more than a century ago in Locke v. United States, 7 Cranch 339, 348, 3 L. Ed. 364. Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. Carroll v. United States, 267 U. S. 132, 162, 45 S. Ct. 280, 288, 69 L. Ed. 543, 39 A. L. R. 790.
>
> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law

> in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice. (Footnotes omitted.)

See *Draper* v. *United States*, *supra* at 311-12; *United States* v. *Heitner*, 149 F. 2d 105, 106 (2 Cir.), *cert. denied sub nom. Cryne* v. *United States*, 326 U. S. 727 (1945); *Cervantes* v. *United States*, 263 F. 2d 800, 803 (9 Cir. 1959).

In the light of these principles there was abundant evidence to support a finding that the officers had probable cause to justify their arrest of the appellant.

Thompson told two narcotics agents operating in undercover capacities that his source of supply was a girl whose description fitted that of the appellant. This information standing alone was perhaps not enough to give the Government reasonable grounds for arresting Mrs. Smith, for when the agents' only knowledge of the defendant's crime is the statement of an informer who the agents do not know to be reliable, it has generally been held that the agents do not have probable cause for an arrest. See *Rodgers* v. *United States*, *supra* at 85; *Contee* v. *United States*, 215 F. 2d 324, 326-27 (D. C. Cir. 1954), and cases

cited therein at 327 n. 1; *Wrightson* v. *United States*, *supra* at 558 n. 3; *Cervantes* v. *United States*, *supra* at 804 (dictum). The Government asserts that a statement by a narcotics peddler to a federal agent while in disguise is more trustworthy than the word of a knowing informer. Appellant naturally takes the contrary position. In passing, we only observe that there was a valid reason for honesty on Thompson's part: the arrangement under which the heroin was to be sold to the agent required that the agent meet appellant and, therefore, required that the agent be able to identify her.

Moreover, there is extensive reliable evidence, additional to the word of a narcotics peddler, sufficient to establish the requisite probable cause to justify the arrest in this case. On October 11, in order to make certain he was quoting a correct price for the heroin to be sold, Thompson left the apartment, went to a bank, and then met appellant—all under the surveillance of two narcotics agents. Upon Thompson's return to the apartment he showed the would-be purchasers two bags that apparently contained heroin. It was reasonable to infer that he got this heroin from appellant. On the next day, in order to check another detail of the sale with his source of supply, Thompson left his potential buyer, agent Robinson, went directly to the building where he had been seen with appellant on the day before, returned, and reported what his source of supply had told him.

Finally, Thompson set up a rendezvous between his source of supply and agent Robinson at 131st Street and Seventh Avenue. Appellant turned up at the appointed place at

the appointed time. This fact alone is an important factor in determining probable cause. *Spurlock* v. *United States*, 295 F. 2d 387 (9 Cir. 1961), *cert. denied*, —— U. S. ——, 82 S. Ct. 1149 (1962); see *Draper* v. *United States*, 358 U. S. 307, 313 (1959).

By the time of the arrest, which is the crucial moment for determining the existence of probable cause, see *Rodgers* v. *United States*, 267 F. 2d 79, 88 (9 Cir. 1959), Thompson's reliability had been sufficiently corroborated so that the agents had the requisite probable cause to arrest appellant. We hold that appellant's arrest and the search incident thereto were lawful.

We turn to the remaining question raised by this appeal, whether the seizure of the narcotics at 108 West 131st Street was illegal as having been an unreasonable one contrary to the protection afforded householders by the Fourth Amendment. Inasmuch as the agents who seized the narcotics had no search warrant, the validity of the seizure depends upon whether appellant consented to the agents' seizure of the narcotics.

The principles which govern us have been well stated in previous opinions. When an accused consents to a search or seizure conducted without a search warrant, the protection he would have enjoyed under the Fourth Amendment is lost to him. *United States* v. *Bianco*, 96 F. 2d 97 (2 Cir. 1938); *United States* v. *Shules*, 65 F. 2d 780 (2 Cir. 1933). However, an accused's voluntary consent must be proven by clear and positive evidence. A consent is not a voluntary one if it is the product of duress or coercion, actual or implicit. Moreover, to be voluntary, a consent must have

been unequivocal, specific, and intelligently given. *Judd* v. *United States*, 190 F. 2d 649, 651 (D. C. Cir. 1951); see *Amos* v. *United States*, 255 U. S. 313 (1921); *Karwicki* v. *United States*, 55 F. 2d 225, 226 (4 Cir. 1932) (per curiam); *Kovach* v. *United States*, 53 F. 2d 639 (6 Cir. 1931) (per curiam); *United States* v. *Kelih*, 272 Fed. 484, 490-91 (S. D. Ill. 1921).

But the case-by-case application of these principles is not always easy. The line between an accused's voluntary consent and his involuntary submission to police authority is often difficult to draw. Though all the cases involving the legality of warrantless searches and seizures are not fully reconcilable, some guidelines are discernible. When a law enforcement officer knocks at the door, identifies himself, and asks to be allowed to search the premises, the acquiescence thus obtained is generally not considered to be voluntary consent. See *Judd* v. *United States, supra; United States* v. *Marquette*, 271 Fed. 120 (N. D. Cal. 1920), *appeal dismissed*, 270 Fed. 214 (9 Cir. 1921); *United States* v. *Slusser*, 270 Fed. 818 (S. D. Ohio 1920); *United States* v. *Marra*, 40 F. 2d 271 (W. D. N. Y. 1930). Likewise, if the defendant denies his guilt, asserts that the police will find nothing (perhaps hoping that the contraband is too well concealed for discovery), and "encourages" the officers to search the premises, even then it has been held that there has been no voluntary consent to the ensuing search. See *Channel* v. *United States*, 285 F. 2d 217 (9 Cir. 1960); *Judd* v. *United States, supra; Higgins* v. *United States*, 209 F. 2d 819 (D. C. Cir. 1954). But see *United States* v. *Adelman*, 107 F. 2d 497 (2 Cir. 1939). In the *Higgins* case

it was stated at 820: "[N]o sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered."

On the other hand, if the defendant permits a warrantless search of his home or establishment in the mistaken belief that he has nothing there which will incriminate him, it has been held that the search has been voluntarily consented to. *United States* v. *DeVico*, 190 F. Supp. 483 (E. D. N. Y. 1961); *United States* v. *Dornblut*, 261 F. 2d 949 (2 Cir. 1958), *cert. denied*, 360 U. S. 912 (1959). Also, if the defendant admits his guilt to the officer, instead of denying it to him, and then allows a search without a warrant, this strongly implies voluntary consent on his part. *United States* v. *Mitchell*, 322 U. S. 65 (1944). Furthermore, the degree of affirmative assistance given to the police by the suspect is often relevant in determining whether consent exists. See *United States* v. *Burgos*, 369 F. 2d 763 (2 Cir. 1959), *cert. denied*, 362 U. S. 942 (1960); *United States* v. *MacLeod*, 207 F. 2d 853 (7 Cir. 1953).

In view of these principles and analogous cases, we hold that the evidence supports the finding that appellant voluntarily consented to the seizure of narcotics at 108 West 131st Street. Except for a few minor inconsistencies in testimony, we have no basis for doubting the credibility of the narcotics agents, inasmuch as appellant put in no evidence whatsoever at either the hearing or the trial. Cf. *United States* v. *DeVico*, 190 F. Supp. 483, 484 (E. D. N. Y. 1961). The testimony of the officers clearly supports consent by the appellant. The narcotics agents could not have questioned her for more than an hour before she agreed

to take them to the spot where the narcotics were kept. There was no evidence that the officers used any coercion in their interrogation, an interrogation conducted in an automobile parked on a city street in the daytime. While the car was so parked at 142nd Street, appellant admitted to having custody of more heroin than that found in her purse when she was arrested. She then agreed to take two agents to this additional heroin. At 108 West 131st Street it was she who produced the suitcase containing the heroin and the key with which to open that suitcase. The officers made no search or seizure while in the apartment beyond the seizure which appellant agreed could be made before she led the officers there.

In this case, therefore, the proven facts demonstrate that the appellant suffered no deprivation of her constitutional right to be secure from unreasonable searches and seizures inasmuch as she gave her consent to the seizure of the heroin in the apartment. As we have shown, she voluntarily admitted to the narcotics agents that she had more narcotics than were on her person at the time of her legal arrest. She was under no compulsion when she led the officers to the place of hiding, and she actively assisted them from that time forward.

The judgment of conviction is affirmed.

Judgment—United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of September one thousand nine hundred and sixty-two.

Present:

HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GEORGE A. THOMPSON,
Defendant,

RUTH SMITH,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Judgment—United States Court of Appeals for the Second Circuit

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Judgment of Commitment of Ruth Smith

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

On this 15th day of March, 1962 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon her plea of not guilty, and a finding of guilty by the Court, the defendant having waived trial by jury of the offense of unlawfully, wilfully and knowingly receiving, concealing and facilitating the transportation and concealment of heroin. (Title 21, Sections 173 & 174, U. S. Code) as charged in counts 3 and 4 and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS on count three, SEVEN (7) YEARS on count four. The sentences on counts 3 and 4 are to run concurrently with

each other. Bail pending appeal fixed at $15,000., on condition defendant diligently prosecute the appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant.

DUDLEY B. BONSAL,
United States District Judge.

HERBERT A. CHARLSON,
Clerk.

Opinion of District Court on Motion to Suppress

The Court: This motion to suppress presents two separate and distinct questions:

One, whether the evidence seized from the defendant on the street at the time of her arrest was in contravention of her constitutional rights; and

Two, whether the evidence seized or obtained in the apartment at 108 West 131st Street was in contravention of her constitutional rights.

As to the first issue, the evidence submitted by the Government indicates that the narcotics agents had reasonable ground to believe that a violation of the Federal narcotics laws had occurred or was being committed, and that the defendant was a participant therein. Consequently, they were justified in making the arrest and any search made of the defendant on that occasion was a lawful incident of that arrest.

As to the second question, the Government has offered proof that the search of the bag at 108 West 131st Street was with the consent of the defendant; that the apartment was entered with her consent; that she there made available to them the bag and its contents. No proof has been offered to negate this evidence.

While the Court is not necessarily concluded by uncontradicted evidence, there is no basis on which it can reasonably reject the agents' testimony. Upon the record the Court at this point finds no basis for rejecting as not credible the evidence so offered.

Accordingly, the motion is denied.

Mr. Itzkowitz: May I, if your Honor please, note an exception to that and call your Honor's attention to the

fact that we were proceeding on the inherent improbabilities of the officers' testimony with respect to her taking them to the apartment and her opening for them the valise. We went on the improbability, and I submit there is authority to the effect that the improbabilities of the situation—if somebody voluntarily, as in this case, taking the government's agent's testimony here, especially in view of the last witness' testimony where she said "I don't know, I don't know", and prior to that you have another agent saying that freely and voluntarily she admitted the crime—

The Court: No, he did not say "freely and voluntarily". He suggested that she might help herself, and the Court does not consider it inherently improbable that a person faced with a serious charge, made in response to an enforcement officer's suggestion to offer to help herself or himself—I do not find any thing in the testimony given by the agent inherently improbable, or any basis upon which the Court should reject the testimony. It is a pure question of credibility.

Now it is true that the Court is not precluded by the testimony of the witness and still has the right to appraise the testimony of the witness to decide whether or not his version is credible, but in this situation the Court accepts the testimony given by the officer.

Mr. Itzkowitz: I would like to call your Honor's attention that there were at least, according to the testimony we had, about three or four other agents who are supposed to have all listened to this portion of the conversation; yet we only have the one man testify to her freely taking them along.

The Court: There is no law that requires a party, whether

it is the government or anybody else, to bring cumulative testimony that is repetitious, or obvious. If you go into that aspect of it, conversely somebody may raise the question why the person allegedly in this apartment by the name of Danny wasn't called.

Mr. Itzkowitz: That is correct.

The Court: Even if the Defendant elected not to testify. It is a pure question of credibility.

Constitutional Amendment, Statutes and Rules Involved

FOURTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* * * * *

TITLE 21, U.S.C. §§ 173 AND 174:

§ 173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium pre-

pared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

§ 174. Same; penalty; evidence.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the

offender shall be imprisoned not less than ten or more than forty years, and in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

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TITLE 26, U.S.C. § 7607 (2):

§ 7607. Additional authority for bureau of narcotics and bureau of customs

The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury; and officers of the customs (as defined in section 401 (1) of the Tariff Act of 1930, as amended; 19 U.S.C., sec. 1401 (1)), may—

(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

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RULE 41.(e), FEDERAL RULES OF CRIMINAL PROCEDURE:

RULE 41. SEARCH AND SEIZURE

(e) Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.